No. 20291

United States
COURT OF APPEALS
for the Ninth Circuit

NATIONAL LABOR RELATIONS BOARD,
Petitioner,

v.

LANE-COOS-CURRY-DOUGLAS COUNTIES BUILDING & CONSTRUCTION TRADES COUNCIL, AFL-CIO; CARPENTERS LOCAL UNION No. 1273, UNITED BROTHERHOOD OF CARPENTERS & JOINERS OF AMERICA, AFL-CIO; CONSTRUCTION & GENERAL LABORERS LOCAL No. 85, INTERNATIONAL HOD CARRIERS, BUILDING & COMMON LABORERS' UNION OF AMERICA, AFL-CIO; and PLUMBERS & STEAMFITTERS LOCAL No. 481, UNITED ASSOCIATION OF JOURNEYMEN & APPRENTICES OF THE PLUMBING & PIPE FITTING INDUSTRY OF THE U. S. & CANADA, AFL-CIO,
Respondents.

BRIEF OF RESPONDENTS

On Petition for Enforcement of an Order of the National Labor Relations Board

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BRIEF OF RESPONDENTS

STATEMENT OF THE CASE

Of critical importance in the Court's consideration of this case, is the understanding that the Bank job and

the City Hall job (see Petitioner's Br. at pp. 2, 4) are separate incidents to be treated independently of each other. There is no proof of connection between the two jobs with reference to the activities of respondent unions or their agents.

In discussing the issue of secondary boycott *vel non* with reference to the Bank job, it should be stated at the outset that there is absolutely no proof or evidence in the transcript or file pertaining to the following respondent unions or their agents: (1) Lane-Coos-Curry-Douglas Counties Building and Construction Trades Council, AFL-CIO (hereinafter called "Council"); (2) Carpenters Local Union No. 1273 (hereinafter called "Carpenters"); (3) Construction and General Laborers Local No. 85, International Hod Carriers, Building & Common Laborers Union of America, AFL-CIO (hereinafter called "Laborers"). Petitioner implicitly concedes this fact (Petitioner's Br. at pp. 2, 4). Likewise with reference to the City Hall job, there was no relevant evidence adduced concerning any activities of the respondent Plumbers & Steamfitters Local No. 481 or any of its agents (hereinafter called "Plumbers").

Of questionable tactic in this matter, therefore, is the action of the Board in grouping in one proceeding *separable* labor organizations as respondents concerning *separable* activities (approximately five months apart) on two *separate* jobs under three *separate* charges, the only connection between these separable elements being the identity of the primary disputant who is the Charging Party, Ramsey.

Respondents, therefore, urge that the Court weigh the evidence in this case and reach separate decisions thereon as to whether *each* of said respondent unions deserves the imposition of Petitioner's broad order.

Bank Job:

Testimony with reference to the Bank job came from essentially three witnesses, Stuart Kidd, Arthur V. Pullen and Raymond Edward Quick. Their combined testimony concerns the activity of *only* the respondent Plumbers.

Mr. Stuart Kidd, an official of the United States National Bank, testified that on or about August 21, 1963, he was informed that the plumber employees had left the construction site (Tr. 32).[1] The next day Mr. Kidd had a conference with Mr. Ramsey and instructed Mr. Ramsey to leave the job (Tr. 37-38). Mr. Ramsey did leave the job, and then Mr. Kidd so informed Mr. Carmickle, the Plumber's representative (Tr. 39). Subsequently the Plumbers did return to work (Tr. 39-40).

Mr. Arthur V. Pullen, another bank official, testified that on or about August 20 or 21, 1963, he received a telephone call from someone purporting to be Mr. Car- telephone call from Mr. Carmickle.

The caller informed Mr. Pullen that the plumbers "were off the job" and that they would not return until the non-union personnel (Ramsey) had left the

[1] The information passed by Pullen to Kidd was that the Plumbers "had gone on sick" (Tr. 32). Kidd further testified that neither Carmickle or any other union representative ever attempted to remove Ramsey from the job (Tr. 40).

job site (Tr. 44-45). Mr. Pullen was certain that Mr. Carmickle had said that the "men were off the job" rather than Mr. Carmickle having said that "he [Carmickle] would pull the men off the job" (Tr. 43-45, 47).

Mr. Raymond Edward Quick, a journeyman plumber who was working at the job site, testified that he left work at the Bank job in order to satisfy his own conscience; he chose not to work on the same job with men who were doing the same kind of work that he was, yet receiving less wages and conditions (Tr. 54). There was nothing in his testimony to indicate he was being urged to leave the job by the union or Mr. Carmickle. The foregoing then is the primary testimony and evidence elicited by the Petiitoner in an attempt to substantiate its charge that the Plumbers were encouraging a work stoppage and had coerced the United States National Bank by threat of such work stoppage, all with an object of having persons cease doing business with Ramsey.

City Hall Job:

Testimony of the following individuals in the transcript all refer to the City Hall, and *only the City Hall,* job: Gale Roberts, William Brown, Jr., Robert B. Magee, Arlie W. Clement, Harold Stevenson, Jack C. Maycumber, Glen Randall, Kenneth A. Burton.

Mr. Gale Roberts, who was the general contractor on the City Hall job and who had subcontracted the sprinkler system construction to Ramsey (Tr. 58), did not testify at any time that respondent unions specifically

threatened to strike or put work stoppage on Robert's own operation. He did testify of several meetings with union representatives (Tr. 58-65), but at no time did those representatives ever threaten him or attempt to coerce him by use of improper secondary boycott means. He did testify that a picket was placed on the City Hall job (Tr. 66). The language on the placard stated,

"RAMSEY-WAITE CO.
WORKING CONDITIONS
Less than enjoyed by Plumbers Union No. 481.
No other dispute exists on this job."

William Brown, Jr., and Robert B. Magee were union *laborers* working on the City Hall job for Mr. Roberts; Arlie W. Clement, Harold Stevenson and Jack C. Maycumber were all union *carpenters* working on the City Hall job for Mr. Roberts. The testimony of these five men indicates the following:

On or about January 14, 1964, the aforesaid picket was placed on the City Hall job (Tr. 72, 88, 103, 111, 117). The employees did not know at first what to do with reference to this picket (Tr. 72). Some of them telephoned or went to the Labor Temple and talked to their respective Carpenter or Laborer representatives (Tr. 72, 74, 88-89, 112). The advice given the employees by these representatives was that they (the representatives) could not advise the employees as to whether or not to cross the picket line (Tr. 98, 99, 100, 112), but rather the decision *had to be made individually by each of the employees* (Tr. 73, 75, 89, 104, 112, 118); *that no fines would be imposed by the unions for crossing*

the picket lines (Tr. 75, 90). Consequently, the employees did go back to work (Tr. 75, 90, 104, 112, 118). The picketing continued (Tr. 76, 90). A few days later, a meeting was called at 4:30 in the afternoon at the Labor Temple (Tr. 76-77, 91, 104). The meeting was called primarily by the Carpenters for the carpenter employees (Tr. 118, 131). Mr. Barton of the Laborers brought some of the laborer employees to that 4:30 meeting (Tr. 77, 92). The Plumbers were not represented or present.

Mr. Glenn E. Randall, as Business Agent for the Carpenters (Tr. 127), testified that the reason the meeting was called was that he and the other union representatives were receiving numerous calls from the different employees and the different crafts working at the City Hall job as to what they should do with reference to the picket (Tr. 138, 140-41). Mr. Randall testified that his advice had always been that the matter would have to be a matter of individual choice on the part of the individuals (Tr. 133). He repeatedly told them that he was unable to tell them whether or not to go through the picket line (Tr. 133). Nevertheless, he did receive questions as to what the fines or what consequences might ensue if the picket were not observed (Tr. 133-34). Consequently, the meeting was called to give the employees the facts as he, Mr. Randall, knew them.

In answer to questions and to assist the employees in making their individual decisions, Mr. Randall pointed out certain rules and regulations existing in the Constitution (Tr. 133). He read to the employees the appropriate portions in the Constitution with reference to

fines and disciplinary measures that might be enforced against employees who cross picket lines (Tr. 133). He did not tell them that these fines would be enforced inasmuch as he did not know and could not state what would happen to the employees if they did go through the picket line (Tr. 134). To the questioning of the employees, he did answer that it was his obligation to inform the international office of the Union of the facts, including the names of those who did cross the picket line (Tr. 134). Again, when asked, Mr. Randall informed them that the amount of a fine, if it would be imposed, to his knowledge and experience, had been on one occasion a full day's pay (Tr. 134). He did point out to the employees that the reason the meeting was called was that there was obvious confusion and misunderstanding, and that he simply wanted to inform them of the facts as he understood them and to clarify the situation (Tr. 131, 132, 135, 140). He did not at this meeting direct anyone to engage in a work stoppage (Tr. 132, 133, 137).

Mr. Kenneth Barton, Business Agent of the Laborers, was also at that 4:30 meeting, and in response to questions from the employees, he stated that he did not know if the employees would be reprimanded or disciplined by the union for crossing the picket line, that all he could do was quote from the Constitution, that he had no right to pass any judgment on it, and that it would become a matter for the executive board of the Union (Tr. 147). Mr. Barton likewise confirmed the statements of Mr. Randall in his testimony.

Certain of the employees also testified that following the 4:30 meeting, they did not return to work the next day (Tr. 81, 95, 121); that their choice not to go to work was individually made (Tr. 83, 121); and no one directed them or threatened them to reach this decision (Tr. 85, 99, 100, 121).

SPECIFICATION OF ERROR NO. 1

It was error for the Trial Examiner to find and conclude and for the Board to approve the finding and conclusion that respondent Plumbers violated § 8(b)(4)(i)(ii)(B) of the Act at the Bank job.

Argument Re: Specification of Error No. 1

Regarding the Bank job, Petitioner does not contend, the trial examiner did not find, and there is no evidence to support a violation of the Act by the Council, the Carpenters, or the Laborers.

With reference to the Plumbers Union and Mr. Carmickle, the Plumbers' Agent, while there was testimony that the Bank ceased doing business with Ramsey and discharged Ramsey under its direct contract with the Bank, there was no proof that the Plumbers encouraged this or that it was an object of union activity. And it is important to keep in mind at this point that "an object" means something more than a mere hope or expectation.[2]

---

[2] "But hope and objective cannot be equated. Unions, like many other organizations, may hope for many things without making those things objects of their programs. Men have many

Furthermore, the outward effect of the union's activities is not controlling; it is the reasons or purposes for the union activity which are controlling. *Schauffler* v. *Local* 30, *Roofers,* 191 F. Supp. 237, 244 (D.C. Del. 1961). Counsel for the Board agrees that success in the union's activity makes no difference (Tr. 152).

In other words, it is not sufficient to merely prove or infer that the Plumbers hoped or expected that a work stoppage might occur on the Bank job, nor is it enough to show simply that the work stoppage did occur on account of the union activity. What is important to show by the evidence is that, underlying the work stoppage, there existed a conscious purpose and object on the part of the Plumbers to effect the Bank's discharge of the Ramsey contract.

The most that can be said is that certain of the plumber employees on the Bank job took individual voluntary action in refusing to work with the Ramsey nonunion employees. And a boycott is not illegal where engaged in by an employer or an employee voluntarily and independently of union activity. *Local* 1976, *Carpenters & Joiners* v. *NLRB,* 357 U.S. 93 (1958) (The "Sand Door" case). Union activity combined with an object designed to create the illegal effect (that is, a secondary boycott) is necessary.

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hopes which are not objectives of action. If the statutory clauses here involved [8(b) (4) (B), LMRA] were to be interpreted as forbidding any strike in which a labor organization hoped that another employer would cease doing business with the primary employer, almost all strikes would be outlawed * * *." *Seafarers Internat'l Union* v. *NLRB,* 265 F.2d 585, 592 (D.C. Circ. 1959). *Accord: United Steelworkers of America, Loc. 4203* v. *NLRB,* 294 F.2d 256, 259 (D.C. Circ. 1961); *NLRB* v. *Loc. 50, Bakery Union,* 245 F.2d 542, 548 (2d Circ. 1957).

Basically, Petitioner and the Charging Party rely upon two instances in the testimony to substantiate secondary boycott against the Plumbers.

The first concerns the telephone call to Mr. Arthur Pullen, a bank official. Petitioner urges this Court to accept the fact that Carmickle told Pullen that *Carmickle* "had pulled the men off the job" (Petitioner's Br. at pp. 4, 10). An examination of the whole record, however, indicates that Pullen corrected his testimony to reflect that Carmickle had only said that the "men were off the job". The testimony of Pullen was this:

> "A. * * * [Carmickle] said that the Union was pulling the men off the job — or had pulled the men off the job * * * because of the employment of a non-union firm, which he identified as Ramsey-Waite. * * *
>
> Q. Now, are you sure of that — which was it; did he say that he was going to pull them off or he had pulled them off?
>
> A. Well, I'm not exactly sure. At that time I think he said that they *had been removed* from the job.
>
> * * * * *
>
> Q. *Did the caller ask you to do anything?*
>
> A. *No.*
>
> * * * * *
>
> Q. Now, returning to the first call on the day previous, I want you to think real hard and see if you can't remember for sure what was said about whether the men were off or would be off?
>
> A. I'm pretty sure they said that the job was — *the men were off the job.*
>
> Q. Did Mr. Carmichael ever use the phrase, 'We'll have to pull the men off the job'?

MR. BAILEY: I am going to object to this. The witness has testified as to what he has said, and that he said *the men were* off.

* * * * *

MR. NELSON: I am going to exhaust his recollection first, Your Honor.

THE COURT: Well, he has answered your questions twice, and they have been *adverse to your position.*" (Tr. 43-46) (Emphasis added)[3]

Is it likely that Carmickle would have pulled the men off the job and then called the Bank to induce a boycott? Is it likely that Carmickle would have had an illegal object in making the call and yet not have asked Pullen to do anything? Hardly.

If a union-induced boycott is the object of Carmickle's actions, then logically, at least at first, he would have forewarned the Bank by threatening the Bank that the "men *would be* pulled off the job" in the future and would have insisted that Ramsey be removed from the job. The testimony is that Carmickle informed Pullen that the men "*were* off the job" and that Carmickle did not ask Pullen to do anything.[4]

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[3] Mr. Kidd, another Bank official, affirms the fact that the Carmichael phone call to Pullen did not indicate that *Carmichael* had pulled the men off the job, but rather that "there were plumbers that had gone on sick" (Tr. 32).

[4] Likewise Mr. Kidd testified that at no time did Mr. Carmickle or any other representative of the Plumbers attempt to remove Ramsey from the job (Tr. 40).

In short then, the express evidence is that the Plumbers never stated or requested that Ramsey be removed from the job. Without such an attempt or request, there could not have been a threat or coercion within the Act's contemplation of those terms.

"[U]nder the circumstances disclosed, including the denial by the [secondary employer] that he had been threat-

The District Court judge was correct: the testimony was adverse to petitioner's position.

In this latter connection, it should also be remembered that there is a difference between threats, coercion and restraint on the one hand and mere argument, persuasion and relation of existing facts on the other. The secondary boycott provisions of the Act were not intended to sever the lines of communication between union officials and neutral employers or persons who have contracted with non-union employers. On the contrary, it is the policy of all the federal labor statutes to encourage the dialogue between labor and management. Accordingly, unions are allowed to attempt *to persuade* secondary employers or persons to cease doing business with non-union employers. *Electrical Workers Union Loc.* 38 (*Hoertz Elec.*), 138 NLRB 17 (1962); *Local* 1976, *Carpenters & Joiners,* 357 U.S. 93, 99 (1958).

The second instance in the testimony wherein petitioner seeks to substantiate a secondary boycott charge against the Plumbers concerns Mr. Carmickle's visit to the Bank job site. Here, Petitioner would have us leap the chasm between insinuation and truth. From the bare testimony that Carmickle asked Quick of the whereabouts of the Ramsey employees and then indicated there would be a meeting between union officials and Ramsey and the general contractor, Petitioners would have this Court affirm a conclusion that Quick

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ened in any way by the union's business agent or any other union representative, insufficient basis existed for a finding that the union had violated Section 8(b)(4)(B), as alleged." Administrative Decision of General Counsel, Case No. SR-996, 1960 CCH NLRB Par. 9386.

and another plumber, Dallas, left the job because Carmickle affirmatively induced and encouraged them to do so. Petitioner would have the Court affirm this breach of logic even in the face of the express statement of Quick as to why he left:

> "[I] chose not, in order to satisfy my own conscience, to work with people who were doing the same kind of work I am and receiving less wages and conditions." (Tr. 54)

The Courts of this nation are conscious of the difference between mere conjecture and competent evidence. There shall be no legal guilt established without proof of facts. To speculate, to surmise, to conjecture, is not sufficient at the law. Imagination has not yet taken the place of competent testimony.

SPECIFICATION OF ERROR NO. 2

It was error for the Trial Examiner to find and conclude and for the Board to approve the finding and conclusion that respondent Plumbers violated § 8(b)(4)(i)(ii)(B) of the Act at the City Hall job.

Argument Re: Specification of Argument No. 2

The evidence shows that the only conduct of the Plumbers regarding the City Hall job was the placing of a picket at the City Hall site and the conversations between Carmickle and the general contractor Roberts and certain other union officials which occurred in September 1963 and on January 13, 1964 (Petitioner's

Br. pp. 4, 5). There is no contention by Petitioner or the Charging Party that this conduct violated the Act. The Petitioner's major thrust for violation of the secondary boycott provisions at the City Hall job is directed at the January 16, 1965 meeting at the union hall. The Plumbers were not present at the meeting (Petitioner's Br. pp. 6, 7; Charging Party's Br. 6). There is simply no evidence to support a finding of violation by the Plumbers at the City Hall job.[5]

SPECIFICATION OF ERROR NO. 3

It was error for the Trial Examiner to find and conclude and for the Board to approve the finding and conclusion that respondent Council, Carpenters and Laborers violated § 8(b)(4)(i)(ii)(B) of the Act at the City Hall job.

Argument Re: Specification of Error No. 3

With reference to the City Hall Job, the choices of the men not to work while Ramsey was performing work on the job site were individually made and were not the product of coercion or encouragement by the respondent

[5] The Charging Party, at pp. 13-14 of his brief, attempts to hold the Plumbers in violation upon some theory of agency or joint venture. There is no evidence or facts in the record to substantiate such a theory, and the Charging Party cites no page in the record in support thereof. Furthermore, the case cited by the Charging Party in support thereof is not apposite: *Retail Clerk Union (Retail Fruit Dealers' Ass'n),* 116 NLRB 856 (1956) *enf'd* 249 F.2d 591 (9th Circ. 1957). In the latter case, there was one union official who was in fact representing two local unions and the proof was clear that his actions were authorized by both unions. *Id.* 249 F.2d at 598.

unions or their agents. The activity on the part of the unions which is under attack concerning the City Hall job is the January 16, 1965 meeting at the union hall at which time facts were reported to the employees upon the request of the employees as a product of their confusion. The respondent unions and their agents at all times made it clear to the employees that the decision had to be individually made, that the unions were not authorizing or instructing any strike or work stoppage. Rather, as a result of a natural curiosity and investigation of the facts by the employees, the agents of the Council, Carpenters, and Laborers did inform the employees of the provisions in the respective union Constitutions, which might or might not be pertinent, and also the fines indicated in said provisions, which might or might not be imposed. The union agents did not frankly know what the consequences would be. Many judges and courts in this nation have been in a similar quandry.

In *Building & Construction Trades Council of Tampa,* 132 NLRB 1564 (1961), union officials made remarks to the membership at a union meeting, telling them that it was legal for each employee to individually decide to stop work for a secondary employer, that the choice was up to them, that they could not be discriminated against if they so decided. It was held that this did not constitute illegal secondary boycott.

> "To read inducement and encouragement into the mere statement that the men could make an individual choice as to handling Cone products is to attach a presumption of guilt to a declaration of

> what the law will permit. This, we think, carries the 'nod, wink, and smile' theory too far. The law does not require that a union refrain from making the law known to its members. * * *" *Ibid.*

Any statements made by Mr. Joseph Willis, Secretary of the Oregon State Building & Construction Trades Council (Tr. 135, 143), who was also present at the January 16 meeting, are immaterial to the matters to be determined here inasmuch as the Oregon State Building Trades is not a respondent union in this matter (Tr. 136) and has not been charged with secondary boycott violation by the Board. Anything stated by Mr. Willis likewise does not have any bearing on the charges brought against the unions made respondents here, inasmuch as there is no evidence (and Petitioner cites no page of the record) which would show that Willis was the authorized agent of any of the respondent unions.

If the unions or the agents hoped or expected the employees to cease work, that mere hope and expectation is not material to the issues in this cause. *United Steelworkers of America, Local* 4203 v. *NLRB,* 294 F.2d 256, 259 (D.C. Circ. 1961); *Seafarers International* v. NLRB, 265 F.2d 585, 591-92 (D.C. Circ. 1959); *NLRB* v. *Local* 50, *Bakery,* 245 F.2d 542, 548 (2d Circ. 1957). Likewise, the fact that a work stoppage did occur is not pertinent to the issues in this cause inasmuch as it is not the effect of the union activity that we are seeking but rather its reasons and purposes. *Schauffler* v. *Local* 30, *Roofers,* 191 F. Supp. 237, 244 (D.C. Del. 1961); *Cuneo* v. *Hod Carriers, Local* 472, 175 F. Supp. 131, 135 (D.C. N.J. 1959).

SPECIFICATION OF ERROR NO. 4

It was error for the Trial Examiner to recommend an order and for the Board to approve an order, which was too broad and extended beyond that which was warranted by the evidence.[6]

Argument Re: Specification of Error No. 4

It is respondent's contention that the cease and desist order, if it is to be enforced at all, cannot stand in its broad form. Insofar as the order does pertain to "any other employer" or to "any other person", it is too broad.

This Court has analyzed the issue of the "broad order" at depth in *NLRB* v. *Ass'n. of Journeymen Plumbers, Local 469,* 300 F.2d 649 (9th Circ. 1962). In the latter case the NLRB was given the choice of either narrowing its broad order or initiating further proceedings to take evidence which would establish the necessity for a broad order. *Id.* at 654.[7]

The evidence does not warrant the conclusion that the respondent's inclination was to extend any alleged,

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[6] The order is printed in Appendix "A" hereto.

[7] In said case this Court quotes with approval the language of the United States Supreme Court:

> "It would seem * * * clear that the authority conferred on the Board to restrain the practice which it has found * * * to have [been] committed is not an authority to restrain generally all other unlawful practices which it has neither found to have been pursued nor persuasively to be related to the proven unlawful conduct. [Citing Cases]" *Communications Workers of Amer.* v. *NLRB,* 362 U.S. 479, 480-81 (1960).

unlawful activity actually found to have been committed.

United Steel Workers of America, Local 4203 v. *NLRB,* 294 F.2d 256, 260 (D.C. Circ. 1961) (order must "correspond to the violations actually found to have been committed");

NLRB v. *Hod Carriers,* 285 F.2d 397, 404-405 (8th Circ. 1960) (evidence did not warrant order extending to "any other employer" or "person");

NLRB v. *Bangor Building Trades Council,* 278 F.2d 287, 291 (1st Circ. 1960) (no evidence that union inclination was to extend to unlawful activity).

CONCLUSION

Respondents respectfully submit that Petitioner's cease and desist order be denied.

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CERTIFICATE OF COUNSEL

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

RONALD B. LANSING,
Of Attorneys for Respondent.

APPENDIX A

The following is the cease and desist order which Petitioner seeks to enforce against the Plumbers:

> "Cease and desist from inducing or encouraging any individual employed by Stimson or Roberts *or any other employer or person engaged in commerce, or in any industry affecting commerce,* to engage in a strike or a refusal in the course of his employment to perform any services for his employer, and from threatening, coercing or restraining the Bank or Roberts *or any other persons engaged in commerce or in an industry affecting commerce* where an object in either case is to force or require the Bank or Roberts *or any person* to cease doing business with Ramsey." [Emphasis added]

The following is the cease and desist order which Petitioner seeks to enforce against the Carpenters, the Laborers and the Council:

> "Cease and desist from inducing or encouraging any individual employed by Roberts, *or any other employer or person engaged in commerce, or in an industry affecting commerce,* to engage in a strike or refusal in the course of employment to perform any services for his employer, and from threatening, coercing or restraining Roberts *or any other person engaged in commerce or in an industry affecting commerce* where an object in either case is to force or require Roberts *or any person* to cease doing business with Ramsey." [Emphasis added]